

BEFORE THE THREE MEMBER DUE PROCESS PANEL  
PURSUANT TO RSMo. §162.961

, by and on behalf	)	
of his son, ,	)	
	)	
	)	Petitioner,
	)	
Vs.	)	
	)	
CASSVILLE R-IV SCHOOL DISTRICT,	)	
	)	
	)	Respondent.

**COVER SHEET OF PERSONALLY IDENTIFIABLE INFORMATION**

The parties to this hearing are:

, Student  
DOB:  
Grade Level: Ninth  
Cassville R-IV School District  
Cassville, Missouri

Mr. , Father

Cassville R-IV School District  
James Orrell, Superintendent  
Cassville R-IV School District  
1501 Main  
Cassville, Missouri 65625-1154

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CASSVILLE R-IV SCHOOL DISTRICT,	)	
	)	
	)	Respondent.

**ISSUES AND PURPOSE OF THE HEARING**

1. Whether the school district violated the parents' rights of participation in the IEP meetings.
2. Whether the school district violated the parents' right to access and review 's education records.
3. Whether the school district's suspension of for ten plus days constituted a change of placement which resulted in a denial of his right to a free appropriate public education.
4. Whether the school district's failure to disclose his education records to the juvenile authorities resulted in the denial of 's right to a free appropriate public education.
5. Whether the April 23, 2001 IEP and its testing accommodations provided with a free appropriate public education that was designed to maximize his capabilities.
6. Whether the district violated the federal regulation that addresses determination of needed evaluation data.

### **TIME LINE INFORMATION**

The initial request for hearing was received by the Department of Education on April 29, 2002. Prior to the expiration of the 45-day time line or on May 12, 2002, the Chairperson received a request from the School District that the hearing be scheduled for June 19-20, 2002 and that the statutory time line for a decision be extended to 30 days beyond June 20. That request was granted in the “Continuance and Scheduling Order” dated May 15, 2002. At the close of the hearing on June 20, 2002 the School District requested that the statutory time line be extended to August 5, 2002, or 30 days after the date that proposed findings of fact and conclusions of law were to be submitted to the panel. The School District’s motion was granted on the record of the hearing.

### **FINDINGS OF FACT**

1. This matter involves the education of (“”), and is before the three-member due process hearing panel empowered pursuant to 20 U.S.C. § 1415 and RSMo. § 162.961.
2. is a student with disabilities for purposes of the Individuals with Disabilities Education Act (“IDEA”), 20 USC. § 1400 *et seq.*
3. Petitioner , on behalf of his son , brought this action pursuant to the IDEA by filing a request for due process against the Cassville R-IV School District (the “District”) with the Missouri Department of Elementary and Secondary Education (“DESE”) on or about April 19, 2002. Ex. R-25; Tr. 4. Subsequently, the District moved to dismiss the request and, in the alternative, moved to clarify the issues to be heard. The Panel Chair denied the motion to dismiss and granted the motion to clarify. In response, on or about June 7, 2002, Mr. submitted an amended due process request.

4. The hearing in this matter was held on June 19-20, 2002. Tr. 1. The District was represented by legal counsel. Mr. represented the Petitioner. Both parties had the opportunity to call and cross-examine witnesses. Respondent's Exhibits R-13, 14, 15, 16, 18, 19, 21, 23, 25, and 36 were admitted without objection. Petitioner's Exhibits, with the exception of Exhibit O, were admitted without objection. Petitioner's Exhibit O was admitted over the District's objection. The hearing was open at the s' request.

Tr. 13.

5. The three-member panel was comprised of George J. Bude, Esq. (chairperson), Larry Kelley and Pamela Walls. Tr. 3.

6. is a -year-old (DOB: ) male student who resides with his parents, and Mary , in the Cassville R-IV School District. Ex. R-14 at 125.

7. has attended school in the District since kindergarten. Ex. R-14 at 125.

8. On or about February 3, 1999, the s requested an IDEA due process hearing that subsequently was dismissed by the three-member panel for failure to state a claim. *See* Affidavit of Ann George at ¶ 2 and Exhibits A and B thereto, attached to District's Motion to Dismiss for Fore More Definite Statement [hereinafter "George Affid."].

9. On or about November 15, 1999, the s filed a second due process request with respect to that was resolved without a hearing. George Affid. At ¶ 3 and Exhibit C thereto.

10. attended the District during the 2000-01 school year. George Affid. at ¶ 4. During that year, received special education services pursuant to an IEP. George Affid. at ¶ 5 and Exhibit D thereto.

11. On or about March 9, 2001, the District provided a written notification to the s regarding an upcoming IEP meeting to be held on March 23, 2001. Ex. R-13; Tr. 43.

The notification indicated that the purpose of the meeting was to review current evaluation information and to review and revise 's IEP. Ex. R-13; Tr. 43. The notification enumerated those individuals invited by the District to attend the IEP meeting. Ex. R-13. Dr. Lutz, the individual with whom the District contracted to provide counseling to , was not invited to the March 23 meeting. Ex. R-13. The District included with the notification a copy of the IDEA procedural safeguards that indicate that parents have the opportunity to invite additional individuals to the meeting beyond those invited by the District. Tr. 44. After receiving the notification the s did not request that Dr. Lutz be invited to the meeting. Tr. 44.

12. In response to the March 9, 2001 notification, on or about March 21, 2001, Mr. wrote to Ms. Ann George, the District's special education director, Tr. 41, requesting access to 's educational records prior to the IEP meeting. Ex. R-13 at 110; Tr. 44.

13. On or about March 23, 2001 and in response to Mr. 's March 9 request, Ms. George mailed the s' copies of 's education records. Ex. R-13 at 111; Tr. 45; 231. At hearing, Mr. acknowledged receipt of those documents and conceded that the District could only provide those records that it had in its possession. Tr. 76-78. In the letter that accompanied the records Ms. George informed the s that the IEP meeting was being rescheduled for April 4, 2001. Ex. R-13 at 111-12; Tr. 45. The second notification of that IEP meeting does not indicate that Dr. Lutz was invited to the meeting. Tr. 46. After receiving that notification the s did not request that the District invite Dr. Lutz to the meeting. Tr. 46. Mr. testified that he had spoken to Dr. Lutz prior to the April 23, 2001 IEP meeting. Tr. 79.

14. Subsequently, the IEP meeting was rescheduled to April 6, 2001 and then to

April 23, 2001. Ex. R-13 at 114, 117; Tr. 45-46. Dr. Lutz was not invited to attend. Tr. 45-46. At hearing Ms. George testified that Dr. Lutz did not participate in the reevaluation, the results of which were to be reviewed at the meeting. Rather, up to that point in time, Dr. Lutz's role was limited to providing counseling to . Tr. 231. Moreover, Ms. George considered the relationship between Dr. Lutz and to be protected by the patient-therapist privilege. Tr. 232. Ms. George did not invite Dr. Lutz to the IEP meeting because his participation was not mandatory under IDEA and because his presence was not otherwise necessary for the IEP team to review the evaluation results or to prepare a new IEP for . Tr. 49, 232.

15. The Panel finds that Dr. Lutz was not a mandatory participant with respect to the April 23, 2001 IEP meeting and that his presence was not necessary for to receive a free appropriate public education pursuant to the IDEA.

16. On or about April 23, 2001 's IEP team convened as indicated in the written notification. Ex. R-14 at 117-24. The team convened to review the results of the recently completed reevaluation and to review and revise 's IEP. Ex. R-14 at 117-24. Dr. Lutz was not present at the meeting. Tr. 38, 49, 66. Mr. and Mrs. attended and actively participated in the meeting. Ex. R-14 at 117-24; Tr. 46-47. Ken Kuschel, the individual who completed the majority of the reevaluation was present and participated in the meeting. Tr. 38; Ex. R-14 at 117-24.

17. The District prepared meeting notes to reflect the discussion and decisions that occurred at the meeting. Ex. R-14 at 118-24.

18. At the meeting the IEP team first discussed the reevaluation that had been recently completed and prepared a diagnostic evaluation report to reflect the results of that evaluation. Ex. R-14 at 117-124; 125; Tr. 47. Mr. and Mrs. were permitted to and

did participate in the discussion regarding the reevaluation. Tr. 47; Ex. R-14 at 117-24. Information that was received from Dr. Lutz was presented to the team members and was considered by them. Tr. 40. Based on the reevaluation, the team concluded that continued to meet the criteria to be diagnosed as learning disabled in reading, math and written expression. Ex. R-14 at 131.

19. During the team's discussion of the reevaluation, Mr. for the first time requested Dr. Lutz's presence and participation. Tr. 7, 49; Ex. R-14 at 122. In response, District personnel indicated to the s that Dr. Lutz's presence was not necessary and that the meeting would proceed without Dr. Lutz. Tr. 47. At that time the s chose to leave the meeting although they were informed that the meeting would continue without them. Ex-14 at 118-24; Tr. 48. Mr. became aggressive at that time and the s left the meeting. Tr. 64; Ex. R-14 at 123.

20. The Panel finds that the s left the meeting of their own accord and that Superintendent Orrell did not order them out of the meeting as they testified at hearing. Moreover, The Panel finds that the IEP team appropriately continued the meeting because the s were provided with at least two notifications of the meeting and had the opportunity to stay and participate in the meeting. *See* Tr. 49.

21. After discussion of the reevaluation and after the s departed the meeting, the IEP team continued its discussion and reviewed and revised 's IEP. Ex. R-15 at 145. The present level of the April 23, 2001 IEP indicates that 's educational diagnosis is learning disabilities in reading, math and written expression and that he also has a speech articulation disorder. Ex. R-15. The progress report notations on that IEP indicate that was making meaningful progress in reading. Ex. R-15 at 155-56. Among the many

accommodations contained within that IEP is one that allows standardized assessments to be read to . Ex. R-15 at 152. Petitioner's Ex. R-1 and R-2 indicate that 's national grade percentile in "Total Reading" ranked in the 39<sup>th</sup> percentile in September, 2000 and improved to the 48<sup>th</sup> percentile as of September, 2001. Tr. 140-42. The April 23, 2001 IEP also includes a behavior intervention plan. Ex. R-15 at 162; Tr. 127. In addition, on April 23, 2001 's IEP team prepared a functional behavioral assessment to analyze his school-related behaviors. Ex. R-16; Tr. 128.

22. At hearing, Ms. George and two of 's teachers, Jeanna Cervantes and Leisa Lasley, testified that the April 23, 2001 IEP was appropriate for and that the oral reading of tests accommodation was appropriate and necessary for to receive a free appropriate public education that maximized his capabilities. Tr. 203-04, 214-15, 176-79, 181-82, 185-87, 192-93. Ms. Cervantes and Ms. Lasley indicated that made progress with respect to his reading goals and benchmarks during the time that the April 23, 2001 IEP was in effect. Tr. 202, 210, 213.<sup>1</sup>

23. At hearing, Mr. and Mrs. acknowledged that 's Stanford Achievement test scores indicated that he made progress in reading from 2000 to 2001. Petitioner's Exhibits R-1 and R-2; Tr. 140-42.

24. At hearing, the s challenged the testing accommodation by testifying that, in their opinion, although the accommodation was appropriate, the District should have been able to improve 's reading skills such that the accommodation was not necessary. Tr. 139, 151. Moreover, Mrs. testified that the s never requested that the accommodation be removed. Indeed, she indicated that they did not want the accommodation removed,

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<sup>1</sup> At hearing Ms. Lasley indicated that regressed academically after his sixteenth birthday in December 2001. Tr. 211. In her opinion, that regression was due to lack of effort and tied to his desire to drop out of school at the age of sixteen. Tr. 211-12. Mrs. testified that had communicated to her that, when he became sixteen, there was no reason to put forth any effort at school. Tr. 153.

but simply wanted the opportunity to discuss the accommodation at an IEP meeting. Tr. 155, 157.

25. At hearing, Ms. Lasley testified that the reading portion of the Standard test that was administered during the 2001-02 school year was not read to so that his reading skills could be determined. Tr. 214. Ms. Lasley, Ms. Cervantes and Ms. George further testified that reading other portions of such assessments was appropriate for , in light of his learning disability, so that the District could determine his knowledge of the content areas being tested rather than his learning disability in reading. Tr. 195, 203-04, 215.

26. The Panel finds that the reading goals and benchmarks and testing accommodations contained within the April 23, 2001 IEP were appropriate for and that the IEP as a whole provided with a free appropriate public education designed to maximize his capabilities. The Panel further finds that made meaningful progress with respect to reading during the duration of the April 23, 2001 IEP.

27. At hearing, the District provided undisputed testimony that Mr. and Mrs. were invited to each of 's IEP meetings and that they were provided with an opportunity to and did participate in those meetings. Tr. 34. Mr. conceded that the s were sent notices of all meetings prior to those meetings, Tr. 71, 74, and that the s were permitted to attend the April 23, 2001 IEP meeting. Tr. 74. In addition, the District provided undisputed testimony that the s were permitted to ask questions and comment on issues at meetings and were never informed that they were not allowed to express their opinions. Tr. 35. At hearing, Mr. acknowledge that he asked questions at the April 23, 2001 IEP meeting and that no one told him he could not ask questions. Tr. 74-76.

28. The Panel finds that the s were accorded all parental participation rights by the District at the IEP meetings during the relevant time.

29. During the 2001-02 school year, attended the District as an eighth grade student and received special education services pursuant to an IEP. George Affid. at ¶ 7 and Exhibit E thereto. During the 2001-02 school year, was assigned to in-school suspension on several occasions. During his assignment to in-school suspension, received all of the special education services called for in his IEP. George Affid. at ¶ 7; Tr. 133.

30. At the time of the April 23, 2001 IEP meeting, the District had no written documentation from Dr. Lutz regarding 's counseling. Tr. 52. However, at the s' insistence that the District make information from Dr. Lutz available, Ms. George contacted Dr. Lutz and, in return, Dr. Lutz faxed a letter to Ms. George regarding . Tr. 50.

31. On or about April 26, 2001, Ms. George sent a copy of Dr. Lutz's letter to the s. Ex. R-19 at 171; Tr. 51.

32. On or about April 27, 2001, Mr. corresponded with the District and indicated the s' disagreement with Dr. Lutz's nonattendance at the April 23, 2001 IEP meeting. Ex. R-19 at 171; Tr. 51.

33. On or about February 19, 2002, was involved in an incident at school involving the distribution of unidentified pills to other students. Ex. R-21; Tr. 95.

34. On or about February 19, 2002, the Middle School Principal, Jill LeCompte, drove home some time before lunch to inform his parents regarding the pill incident. Ex. R-21; Tr. 90, 100. Ms. LeCompte found it necessary to take home because, at that time, the s did not have a telephone and Ms. LeCompte had no other way to inform the family of the misconduct. Tr. 95-6.

35. When Ms. LeCompte drove home, Mrs. was present and Ms. LeCompte informed her that would receive a ten-day out-of-school suspension. Ex. R-21 at 179; Tr.

95, 105. At that time, Ms. LeCompte intended to suspend for only ten days and, therefore, the District did not convene 's IEP team to conduct a manifestation determination or a functional behavioral assessment. Tr. 109, 112.<sup>2</sup> Because of an inclement weather day, the suspension was extended for an additional day. Petitioner's Exhibit N; Tr. 97.

36. At hearing, Ms. LeCompte realized for the first time that inadvertently was suspended for slightly more than ten days. Tr. 99. In addition to the ten days indicated in her letter informing the parents of the suspension, also was removed from school for the portion of February 19 after which Ms. LeCompte took him home. Tr. 97-100.

37. The Panel finds that the suspension for slightly greater than ten days was simply due to an inadvertent mistake on the District's part. The Panel further finds that

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<sup>2</sup> At hearing Ms. George testified that, in her opinion, the incident of February 19 was not related to 's learning disability because it was of a completely different nature than previous behavior displayed by at school. Tr. 130-32; *see also* Tr. 96.

the District intended to suspend for only 10 days and that was not harmed as a result of the additional time that he was removed from school. The Panel also finds that the District's failure to conduct a manifestation determination and functional behavioral assessment at that time also did not result in harm to .

38. At the time that was suspended on February 19, 2002, the District informed the juvenile authorities of the pill incident. Ex. R-179; Petitioner's Exhibit X; Tr. 125-26. The District did not transmit 's education records to the juvenile authorities because it did not have the s' consent to do so. Tr. 125-26. Moreover, the juvenile authorities did not request the District to send 's records and did not present the District with a subpoena or court order to obtain those records. Tr. 123, 125-26. The juvenile authorities also did not request the s to provide the records nor did the s take any action to have them sent. Tr. 120. The juvenile authorities took no adverse or negative action against with respect to the February 19 incident. Tr. 120; Petitioner's Exhibit X.

39. On or about April 12, 2002, the District sent the s a written notification for an IEP meeting to be held on April 23, 2002 to review and revise 's IEP. Ex. R-23; Petitioner's Exhibits A and B; Tr. 55-56. On or about April 18, the District sent a second notification for that meeting. Ex. R-23; Tr. 56.

40. On or about April 15, 2002, Mr. wrote to the Missouri Department of Elementary and Secondary Education and requested a due process hearing under IDEA against the District. Ex. R-25. In that request, Mr. merely enumerates ten regulatory and statutory sections that he believes the District violated. Ex. R-25. That request was received by DESE on or about April 19, 2002. Ex. R-25 at 185. The request was amended pursuant to order of the Chairperson, granting Respondent's motion for a more definite statement.

## **CONCLUSIONS OF LAW**

Under the IDEA, all children with disabilities are entitled to a free appropriate public education (“FAPE”) designed to meet their unique needs. 20 U.S.C. §§ 1412(a)(1); 1401(8). Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Bd. Of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 189, 195 (1982), and does not require “strict equality of opportunity or services.” *Id.* at 198. Rather, a local educational agency fulfills the requirement of FAPE by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203. As stated by the *Rowley* Court, an appropriate educational program is one that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 207; *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1207, 1035-36 (8<sup>th</sup> Cir. 2000).

The primary vehicle for carrying out the IDEA’s goals is the “individualized education program” (“IEP”). 34 C.F.R. §300.15. The IEP is a written statement that is developed to meet the “unique needs” of each disabled child, and is prepared at a meeting that includes representatives of the local educational agency, the child’s current teacher(s), the parents or guardian of the child, and, whenever appropriate, the child. 34 C.F. §§ 300.340-347. each IEP must contain a statement of the child’s present level of performance, including how the child’s present level of performance, including how the child’s disability affects the child’s involvement and progress in the general curriculum; a statement of measurable annual goals, including benchmarks or short-term objectives, relating to meeting the child’s needs that result from the disability; a statement of special education and related services to be provided to the child; and the projected beginning dates of the services offered and the anticipated duration, frequency and location of those

services. 34 C.F.R. § 300.347. Where a student's behavior impedes his learning or that of others, the IEP team must consider the addition of strategies to address that behavior. 20 U.S.C. § 1414(d)(3)(B). Further, the IDEA requires that each IEP must be reviewed at least annually and, where appropriate, revised. 34 C.F.R. § 300.343(c)(1).

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig v. Doe*, 484 U.S. 305, 308 (1988). In recognizing that a consensus regarding a child's proper placement and IEP would not always be possible, Congress provided for administrative review of an IEP determination at the request of either the parents or guardian or the local educational agency and, after exhaustion of the administrative review process, judicial review in a state or federal court. If the parents disagree with the IEP, or proposed changes to the IEP, the state must provide them with an impartial due process hearing. 20 U.S.C. § 1415(b); 34 C.F.R. § 300.507.

#### **I. The District Did Not Violate The s' Parental Rights Of Participation.**

In his first and third allegations, Mr. asserts that the District violated 34 C.F.R. §§ 300.344 and 345 on the following dates: April 12, 2002 and April 18, 2002.<sup>3</sup> Section 300.344 enumerates those individuals whose participation in IEP meetings is mandatory. More specifically, Section 300.344 provides, in pertinent part, as follows:

The public agency shall ensure that the IEP team for each child with a disability includes --

- (1) The parents of the child;
- (2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

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<sup>3</sup> During the pre-hearing stage, the Chairperson ruled that the s could not pursue any claims that post-dated their due process request dated April 19, 2002. Tr. 5-7.

- (3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;
- (4) a representative of the public agency who--
  - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (ii) Is knowledgeable about the general curriculum; and
  - (iii) Is knowledgeable about the availability of resources of the public agency;
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) If appropriate, the child.

Similarly, Section 300.345 addresses parent participation in the IEP process. That regulation provides that “[e]ach public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including – (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend.” In addition, that same regulation provides that “[a] meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend.” *See Burlobich v. Bd. Of Educ. Of Lincoln*, 208 F.3d 560 (6<sup>th</sup> Cir. 2000) (finding that parents failed to demonstrate that they were denied participation in the special education process where they expressed their views and had opportunity to participate at IEP meetings).

In the instant case, it is clear that the s were fully accorded all rights relating to parental participation and, indeed, acknowledged at hearing that those rights were respected. Significantly, the s main argument in this regard is that, in some undefined way, they were not permitted to fully participate because Dr. Lutz was not present at the April 23, 2001 IEP meeting. Clearly, however, Dr. Lutz is not one of the mandatory participants in the IEP process. Moreover, the s had the opportunity to invite Dr. Lutz to

attend and participate, but did not do so. However, Mr. conceded that he had spoken to Dr. Lutz prior to the April 23 meeting. Further, although not required to do so, Ms. George solicited Dr. Lutz's written input at the s' request and provided that information to the s.

In addition, the s' decision to prematurely depart the April 23, 2001 meeting in no way infringed on their rights of participation. The s were notified of the meeting well in advance and were, in fact, in attendance at that meeting. At the point in the meeting where they chose to leave, they clearly were informed that the meeting would continue without them. Having elected to leave that meeting under those circumstances, the s should now not be heard to complain that they were not permitted to fully participate.

Because the s were provided with the opportunity to participate in each of 's IEP meetings and because the District had all necessary participants present at each scheduled IEP meeting, the Panel concludes that the s failed to meet their burden to prove violations regarding allegations one and three.

## **II. The District Did Not Violate The s' Right to Access and Review 's Education Records.**

Similarly, the Panel fails to find a violation with respect to the s' Issues Two and Ten. The s' original due process request dated April 15, 2002 indicates that the s contend that the District violated 34 C.F.R. § 300.501 and § 300.562. Section 300.501 provides that the "parents of a child with a disability must be afforded ... an opportunity to (1) Inspect and review all education records" of the child. Similarly, § 301.562 states that "each participating agency shall permit parents to inspect and review any education records relating to their children...and before any meeting regarding an IEP."

In their supplemental request dated June 7, 2002, the s contend that the district violated these regulations on April 12, 2002 and April 18, 2002 and on April 23, 2001 by failing to reschedule an IEP meeting so that a related service provider could be present. As a threshold matter, the Panel concludes that the June 7 supplemental request fails to indicate in what manner the District failed to permit the s to inspect and review 's education records. Moreover, at hearing, the s failed to provide any evidence whatsoever to support their claims pursuant to these regulations. Indeed, the only evidence presented on this issue conclusively establishes that the District provided copies of 's education records to the s when they so requested. Further, Ms. George testified and the s conceded that, other than the March 9, 2001 letter from the s requesting access to 's records, the s did not request such access at any other time and the District did not refuse at that time to provide such access. Because the undisputed evidence establishes that the s were granted the requisite access to 's education records, the Panel finds in the District's favor with respect to issues two and ten.

### **III. The District's Suspension of For Slightly More Than Ten Days Did Not Deny a FAPE Nor Did It Result In Any Harm To Him.**

In allegation four (supplemental), the s contend that the District violated 34 C.F.R. § 300.519 when it suspended for ten days of out-of-school suspension on February 19, 2002. That regulation provides, in pertinent part, as follows:

For purposes of removals of a child with a disability from the child's current educational placement..., a change of placement occurs if --

- (a) The removal is for more than 10 consecutive school days;  
or
- (b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of removal, the total amount of time the child is removed, and the proximity of the removals to one another.

Pursuant to the comments to the federal regulations, the U.S. Department of Education noted that “[a]n in-school suspension would not be considered a part of the days of suspension addressed in paragraph (a) of this section as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement.” Fed Reg., vol. 64, No. 48, at 12619 (comment to 34 C.F.R. § 300.519).

Sections 300.520(b)(1)(i) and 523 require a district to conduct a manifestation determination and functional behavioral assessment where the student has been removed from the current placement for more than 10 consecutive school days or for more than 10 school days if those removals constitute a pattern of exclusion.

In the instant case, the evidence at hearing showed that, although the District intended to initiate an out-of-school suspension for only ten days on February 19, 2001, an inadvertent miscalculation resulted in ’s being suspended for almost eleven days. Therefore, although technically a slight change of placement occurred, thus triggering the District’s obligation to conduct a manifestation determination and functional behavioral assessment, the Panel concludes that the District’s failure to do so resulted in a technical procedural error that did not deny a free and appropriate public education.

In reaching this conclusion, the Panel notes well-established law providing that procedural violations alone are insufficient to establish a violation of IDEA. *See, e.g. Independent Sch. Dist. v. S.D.*, 88 F.3d 556, 557 (8<sup>th</sup> Cir. 1996); *Evans v. Dist. No. 1 of Douglas County, Neb.*, 841 F.2d 823, 825 (8<sup>th</sup> Cir. 1998). In this case, the failure to conduct a manifestation determination and functional behavioral assessment did not result in a denial of FAPE. The case of *Farrin v. Main Sch. Dist No. 59* is particularly

instructive on this issue. 35 IDELR 189 (D. Me. Oct. 10, 2001). In that case, the student (Jacob) brought marijuana to school in October of 2000. On the same date, he arranged for another student to sell the marijuana to a third student. Jacob then received the proceeds from that sale. After the principal discovered and confronted Jacob with the violation on November 3, 2000, he suspended the student for 10 days and notified the parents of that suspension in a letter. The letter indicated that Jacob would have to appear before the Board of Education for a disciplinary hearing but did not mention any rights under IDEA. On the evening prior to Jacob's eleventh day of suspension, the board met and voted to expel Jacob for the remainder of the school year. At the Board meeting, the Board was made aware that Jacob was disabled and that a manifestation determination would have to be held. Jacob began serving the expulsion the next day. On that date (November 22, 2000), the District's special education director contacted the parents to schedule the manifestation determination meeting. The meeting to conduct the manifestation review, however, did not occur until December 11, 2000. At the meeting, the team concluded that the drug incident was not a manifestation of Jacob's disability.

At a subsequent due process hearing and in the federal courts, the parents challenged whether the delay in holding the manifestation review affected Jacob's right to FAPE. In rejecting the parents' claim of an IDEA violation, the court concluded that the delay in holding the manifestation review did not harm the student. *Id.* As noted by the court, "there is no evidence that holding the meeting two days late affected its outcome, or the method by which the [IEP team] addressed the issues. Finally, it does not appear that Jacob suffered any ill effects from the tardiness of the meeting...." Because the delay did not negatively affect Jacob, the court ruled that the delay was harmless.

Similarly, in this case, the District's failure to conduct the manifestation review and functional behavioral assessment did not harm in any way. As noted above, the District intended to suspend for only ten days and , in fact, only was removed from school for slightly over ten days. In addition, the only evidence presented at hearing on the issue indicated that 's misconduct on that date was not related to his learning disability. Finally, the District presented undisputed evidence that, at the time of the misconduct, 's IEP team had completed prior functional behavioral assessments and developed appropriate behavioral plans and that those remained relevant at the time of the hearing.

Accordingly, for these reasons, the Panel concludes that the District's inadvertent more than 10 day suspension and its failure to convene the IEP team to conduct a manifestation determination and functional behavioral assessment did not result in any harm to and did not deny him a free appropriate public education.

#### **IV. The District Did Not Violate 's Right to FAPE When It Did Not Disclose His Education Records To The Juvenile Authorities.**

In issue eight, Mr. alleges that the District violated 's rights when it failed to transmit his education records to the juvenile authorities after the February 2002 disciplinary incident. Section 300.529, the regulatory section cited by Mr. , provides as follows:

- (a) Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.
- (b)(1) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

34 C.F.R. § 300.529(a), (b)(1).

Unfortunately, Mr. failed to take note of the following subsection (2) which specifically provides that “[a]n agency reporting a crime under this section may transmit copies of the child’s special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.” 34 C.F.R. § 300.529.

The Family Educational Rights and Privacy Act (“FERPA”) is a federal law that applies to schools and educational agencies receiving federal financial assistance. 20 U.S.C. § 1232. FERPA prohibits schools from disclosing or releasing a student’s educational records without written parental consent, a court order or a properly issued subpoena or unless another exception applies. *See Id.*<sup>4</sup>

In the instant case, the evidence demonstrated that the District did not violate this provision of IDEA because none of the FERPA prerequisites were in place that would have permitted disclosure of ’s education records to the juvenile authorities. At hearing, Mr. conceded that the s had not provided the requisite parental consent nor was there a court order or subpoena issued that would have authorized such

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<sup>4</sup> None of the numerous exceptions under FERPA applies to the instant case.

disclosure. More importantly, it is clear from the evidence that was not prejudiced by the fact that the records were not disclosed.

**V. The April 23, 2001 IEP And Its Testing Accommodations Provided With A FAPE That Was Designed To Maximize His Capabilities.**

Pursuant to the *Rowley* standard, the IDEA does not require to maximize the educational benefit to the child, or to provide each and every service and accommodation which could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Clynes*, 119 F.3d at 612. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. Of Educ. Of Tullahoma City Schls*, 9 F.3d 455, 459 (6<sup>th</sup> Cir. 1993), *cert.denied* 128 L.Ed.2d 665 (1994), as stated by the *Rowley* Court, an appropriate educational program is one which is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 207; *see also Clynes*, 119 F.3d at 611. In articulating the standard for FAPE, the *Rowley* Court concluded that “Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful.” 458 U.S. at 192. The Court found Congress’ intent was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.* *See also Clynes*, 119 F.3d at 612.

With this definition, the Act defines a free appropriate public education (“FAPE”) in broad, general terms, without dictating substantive educational policy or mandating specific educational methods. This imprecise nature of the IDEA’s mandate reflects two important underpinnings of FAPE. First, “Congress chose to leave the selection of educational policy and methods where they have traditionally resided—with state and local officials.” *Daniel R.R. v. State Bd. Of Educ.* 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989). Second, Congress sought to bring children with disabilities into the mainstream of the

public school system. *Mark A. v. Grand Wood Area Education Agency*, 795 F.2d 52, 54 (8<sup>th</sup> Cir. 1986); *Rowley*, 458 U.S. at 189.

The key inquiry in determining whether a district is providing FAPE is to assess “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff’d*, 471 U.S. 359 (1985). As stated by one court:

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals; it emphasizes an appropriate, rather than an ideal education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.

*Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993).

Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F.2d 1031, 1035, 1040 (3<sup>rd</sup> Cir. 1993). As noted by the *Fuhrmann* court, “[n]either the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” 993 F.2d at 1040. Therefore, “events occurring months and years after the placement decisions had been promulgated, although arguably relevant to the court’s inquiry, cannot be substituted for *Rowley*’s threshold determination of a ‘reasonable calculation’ of educational benefit.” *Id.*

However, in December 2001, the Missouri Court of Appeals for the Western District of Missouri held that Missouri’s statutes regarding special education set a higher standard for services than the minimum standard established in *Rowley*. See *Lagares v. Camdenton R-III School District*, 2001 WL 1601862 at \*6 (Mo. App. Ct. Dec. 18, 2001).

Thus, the court held that Missouri requires a “maximizing” standard that it defined, by reference to Webster’s Dictionary, as “to increase to the highest degree.” *Id.* at \*7. the court characterized the Missouri standard as requiring the provision of “special educational services sufficient to meet the needs and increase to the highest degree the capabilities of handicapped children.” *Id.* at \*7.

The Panel concludes that the testing accommodation provided in ’s IEP was necessary for him to receive an appropriate education that maximizes his capabilities. Indeed, there is credible evidence that without the accommodation would not have been able to answer test questions in many instances. Further, the Panel concludes that was making substantial and meaningful progress with regard to reading. The March 2001 IEP was reasonably calculated to offer the opportunity to reach his maximum potential in light of his learning disabilities and associated needs.

#### **IV. The District Did Not Violate The Federal Regulation That Addresses Determination Of Needed Evaluation Data.**

In issue nine, the s allege that the District violated IDEA’ regulatory section that deals with the determination of needed evaluation data. At hearing, the s’ contentions with respect to this allegation were not clear. Rather, the s merely presented evidence that the District did not invite or have Dr. Lutz present at the April 23, 2001 IEP meeting. Because that evidence was completely irrelevant to the allegation and because the s presented no other evidence with respect to this provision, the Panel finds no violation.

### **DECISION**

1. The Panel concludes that the District did not violate ’s or the s’ rights under the IDEA.

2. The Panel concludes that the District is the prevailing party with respect to the ten issues raised in the s' April 19, 2002 due process request, as amended.

3. Finally, the Panel feels compelled to address what it perceives as the s' unreasonable and unexplained harassment of the District by filing this third due process request since 1999. At hearing, it became clear to the Panel that the s had no substantial disputes with 's IEP or placement and that the instant due process request was merely one in a long line of complaints of various sorts filed against the District. This opinion was confirmed by the s' refusal to resolve the case through a settlement agreement to which they orally agreed, but they refused to sign the written document. Having stated this opinion, the Panel urges the s to act in a cooperative manner and support what clearly are more than appropriate efforts by the District to provide a meaningful education to . is a young man who has the potential to be successful in his future endeavors, but his parents' support will be necessary.

### **APPEAL PROCEDURE**

**PLEASE TAKE NOTICE THAT THE FINDINGS OF FACT, DECISION, AND RATIONALE CONSTITUTE THE FINAL DECISION OF THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION IN THIS MATTER.**

**PLEASE TAKE FURTHER NOTICE** that you have a right to request review of this decision pursuant to the Missouri Administrative Procedure Act, Section 536.010 et seq. RSMo., specifically, Section 536.110 RSMo. Which provides in pertinent part as follows:

- “1. Proceedings for review may be instituted by filing a petition in the Circuit Court of the county of proper venue within 30 days

after the mailing or delivery of the notice of the agency's final decision....

3. The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole County or in the county of the plaintiff or one of the plaintiff's residence...."

**PLEASE TAKE FURTHER NOTICE** that, alternatively, your appeal may be taken to the United States District Court for the Western District of Missouri in lieu of appeal to the State courts. 20 U.S.C. § 1415.

Dated this \_\_\_\_\_ day of July, 2002

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LARRY KELLEY, Panel Member

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PAMELA WALLS, Panel Member

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GEORGE J. BUDE, Chairperson